

Q&A With Akin Gump's Robert Huffman

Law360, New York (September 22, 2010) -- Robert K. Huffman is a partner in the Washington, D.C., office of Akin Gump Strauss Hauer & Feld LLP. He represents defense, health care and other companies in contract matters and in disputes with the federal government and with other contractors and has experience litigating contract and related issues in the Court of Federal Claims, the Armed Services Board of Contract Appeals, the federal district courts, and the Federal Circuit and other federal appellate courts. He also represents clients in bid protests.

Huffman is a chairman of the procurement fraud committee of the ABA section of public contract law, and he speaks and writes frequently on False Claims Act issues.

Q: What is the most challenging case you have worked on, and why?

A: My most challenging case was a breach-of-contract case in the United States Court of Federal Claims, *First Heights Bank v. United States*, 53 Fed. Cl. 195 (2002). *First Heights* was one of several cases in which a large homebuilder or other firm contracted with the government to purchase failed thrifts in the late 1980s based upon the government's representations that the buyer would be able to deduct the thrift's losses even though the government reimbursed the buyer for those losses. Congress subsequently enacted legislation that retroactively eliminated this so-called "double-dip" deduction.

My client was Pulte Corporation, which purchased *First Heights* savings and loan association from the government in 1988, in part to capture the benefits of the "double-dip" deduction. The Court of Federal Claims (and the Federal Circuit) ultimately found that Congress had targeted the contractual benefits reasonably expected by Pulte and other similarly situated buyers when it eliminated the double-dip deduction and that such "bait and switch" tactics by Congress breached the government's implied obligation of good faith and fair dealing.

This case was particularly challenging because: (1) the tax benefits in question were complex, difficult to quantify and not expressly guaranteed to the buyers by the contracts; (2) no court had previously found a breach of contract based upon changes to the tax code; and (3) no court had previously found a breach of the implied obligation of good faith and fair dealing by Congress. Nevertheless, Pulte and the other plaintiffs were able to persuade the courts that the government (specifically, Congress) had breached the contracts by eliminating those benefits and that the plaintiffs were entitled to damages equal to the tax benefits they would have enjoyed had Congress not eliminated the deduction.

Q: What accomplishment as an attorney are you most proud of?

A: Outside of my pro bono and other cases, the accomplishment of which I am most proud is my work on a treatise entitled "Guide to the Mandatory Disclosure Rule," published earlier this year by the public contract law section of the American Bar Association. This publication provides practical advice regarding the recently promulgated FAR Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule. 73 Fed. Reg. 67,064 (Nov. 12, 2008). This rule represented a sea change in the relations between the government and contractors (and subcontractors).

As co-editor of the guide, I was able to work closely with a task force of distinguished and knowledgeable lawyers from the government, companies, academia and the private bar on subjects of great interest to me, including the practical impact of mandatory disclosure requirements on the conduct of internal investigations, the limitations on the government's ability to protect confidential contractor information and the practical consequences of recent amendments to the False Claims Act. I hope that the product of our work will be useful to the entire government contracts community, including the government and the courts, for years to come.

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

A: The primary aspect of the law that is in need of reform in my practice area is the constantly changing and (therefore) unpredictable nature of the law of government contracts. Ironically, this volatility is primarily due to "reform," i.e., congressional oversight, investigations and "procurement reform" legislation; new contracting requirements imposed by the administration and various agencies; and unexpected decisions by the Federal Circuit and other courts.

All of these changes have made it very difficult for lawyers in my area to evaluate risks and to give meaningful advice to our clients. The best "reform" that could happen now would be a period of stabilization and consolidation in which the practical effects of the recent "reforms" can be sorted out. For example, Congress has amended the Civil False Claims Act three times in the past 18 months; perhaps it should take a break before enacting any further amendments.

Likewise, the GSA has just begun to implement the Federal Awardee Performance and Integrity Information System ("FAPIIS") requirements imposed by Congress in the FY 2009 DOD Authorization Act, yet Congress is already considering (and adopting) "reforms" that would significantly expand the scope (and public availability) of this system. Finally, the Department of Defense has recently proposed substantial changes to the DFARS provisions regarding Organizational Conflicts of Interest ("OCIs"); we should see how these new rules work out before similar changes are made to the FAR OCI provisions, as are currently contemplated.

Q: Where do you see the next wave of cases in your practice area coming from?

A: I see a growth in acquisitions and bid protests in view of the recent OCI changes and legislative and administrative budget cuts; growth in qui tam and other enforcement proceedings as a result of the FCA amendments and the health care and financial reform legislation; and a growth in oversight, investigations and disputes involving cybersecurity, intelligence and IT contracts and subcontracts.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: I am impressed by many lawyers who practice in my area, but one lawyer who has impressed me for many years is Ralph Nash, the former G.W. law professor and current editor of The Nash & Cibinic

Report. Ralph Nash and his former colleague John Cibinic (whom I also admired) “invented” government contracts as an academic discipline by bringing an order and coherency to the field that had not previously existed.

Ralph has continued to bring order and coherence to the field through his articles, speeches, newsletter, textbook updates and practical advice. Ralph is remarkable in that he blends an intimate knowledge of virtually every decided case in government contracts with an understanding of the practical pressures and realities that face government contractors and government procurement officials in their daily work. He has been a great friend, mentor and model for me even though I never had the privilege of taking his courses.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: My advice would be to look at government contracts (or any specialty area, for that matter) as part of a much bigger picture and to look for career opportunities that offer exposure to the biggest picture possible. The “big picture” of which government contracts is a part includes contract law, federal regulatory law, litigation, IP and federal information and privacy law, to name but a few.

Many career opportunities provide exposure to this “big picture,” including jobs in the Department of Justice and other federal agencies, in-house counsel for contractors of all sizes and private firms. I would advise resisting sub-specialization in any area for as long as possible. Perhaps, if you are lucky, you will never cease being a “generalist.”

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