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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Mayer Brown's Marcia Madsen

Law360, New York (April 03, 2013, 1:30 PM ET) -- Marcia Madsen, a partner in Mayer Brown LLP's Washington, D.C., office, leads the firm's government contracts group. She represents contractors and potential bidders from many industries, advising on issues including contract formation, strategic alliances, contract and subcontract negotiations, performance disputes, audits, terminations, cost accounting and allowability, technical data rights and trade secrets and fraud/false claims investigations. She also litigates bid protests and claims and disputes. Madsen chaired the Services Acquisition Advisory Panel (1423 Panel), whose recommendations have been substantially adopted in law and regulation, and is a past chair of the American Bar Association's Section of Public Contract Law.

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

A: The bid protests involving former Air Force Principal Deputy for Acquisition Darlene Druyun, in which I represented the protester in both cases, posed some difficult and unique issues. There was the guilty plea, but there also were statements submitted by Druyun in connection with the criminal proceedings regarding how her decisions in then-pending procurements for the C-130 AMP and Small Diameter Bomb contracts were influenced by her "perceived indebtedness to Boeing for employing her future son-in-law and daughter." Those statements cast serious doubt on whether the proposals were fairly evaluated.

In an effort to provide the agency an opportunity to address its own issues, two agency-level protests were filed. However, the Air Force declined to decide them and took the position that the protests should be decided by the U.S. Government Accountability Office. In the GAO proceeding, the agency took the position that, notwithstanding the Druyun statements, there was no evidence that she had influenced the evaluation in either procurement. The agency proceeded to attempt to defend the awards requiring detailed evidence and testimony to be presented in both cases regarding the evaluation, how Ms. Druyun interacted with the evaluators, and how efforts were made to "clean up" the record. The cases were the subject of long hearings — back to back. GAO ultimately sustained both protests.

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

A: This is a question that goes to the much broader issue of the current state of federal procurement. Increasingly, there appears to be a disconnect between those who are involved in the business side of federal procurement, i.e., Federal Acquisition Regulatory Council, the contracting agencies for whom the contracting process is a means to fulfill their missions and the contracting officers, versus the enforcement community.

It is not clear today who has the final word on interpretations of procurement law and regulations, as well as decisions with respect to the procurement process, the award, performance and administration of contracts. When it contracts, the government is reaching into the marketplace and engaging in a business transaction, albeit one that is highly regulated. Currently, when business decisions have to be made, e.g., what the specifications should say, what the contracting strategy should be, what are reasonable prices to be paid, whether performance is what the agency needs — indeed whether the contract should be adjusted — such decisions appear to be almost completely second-guessed by the law enforcement side of the government.

Thus, agency officials are limited in their ability to accept business risks — since any risk is becoming an issue for investigation and recrimination. The process desperately needs a rational disputes mechanism where buyers and sellers can address the types of issues that inevitably arise in the performance of any contract — and especially in contracts for complex products and services.

Disagreements and issues are inevitable — the question is how to resolve them. As the audit and enforcement mentality has grown, the ability to use the Contract Disputes Act process has declined. The procurement community needs to look for a meaningful solution to address real-world risks and problems — recognizing that perfect compliance with reams of requirements and federal terms likely is not possible.

There are legitimate questions about how to address the problems and excesses that have accompanied contingency operations. It may be that certain special provisions and adjustments must be made in certain circumstances. That does not mean basic principles should be abandoned or that the entire system has to be changed to address particular war time contracting concerns.

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

A: The Contract Disputes Act needs to be amended or the entire process changed to permit a rationale and timely means to address disagreements short of the use of subpoenas, investigations and fraud allegations.

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

A: Judge Ruth Burg is a tremendous role model for women lawyers practicing in government contracts. While at the Armed Services Board of Contract Appeals, she handled some of the most difficult and contentious cases and did not back away from doing what she thought was right. Her research was impeccable and her opinions thoughtful and analytical. Many of her opinions continue to provide fundamental precepts of the law in this area. She remains active in the bar and continues to make valuable contributions to the advancement of women lawyers. And she did all of this while also raising a family.

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

A: As a first-year associate, I was handed an appeal involving a particularly complex question — but the dollars at stake were small. I labored over the main summary judgment brief to the Board of Contract Appeals — trying to make every possible point. I was justifiably proud of my mastery of the subject matter. But, the Board of Contract Appeals was looking for a much simpler presentation. Mercifully, a very kind and wise judge provided some valuable advice and a second chance to make a submission. The next submission was much shorter and simpler. The lesson learned was that just because an issue is complicated does not mean the presentation must be — distilling hard issues into understandable arguments is the lawyer's job.

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