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Despite D.C. Circ. Win, Contractors Can't Ignore TAA Traps

By **Dietrich Knauth**

Law360, New York (September 08, 2014, 5:01 PM ET) -- Contractors are cheering a D.C. Circuit decision that dismissed False Claims Act liability for contractors that relied on a computer wholesaler's certification of Trade Agreements Act compliance, but the court win doesn't remove the need for due diligence in vetting such certifications, attorneys say.

Relator Brady Folliard had accused two contractors, Govplace Inc. and Government Acquisitions Inc., of improperly selling China-made technology products to the U.S. government. He said the companies were reckless when they relied on their supplier's certifications that the products met Trade Agreements Act requirements.

The D.C Circuit affirmed the suit's dismissal, saying there was no reason to doubt the certification, so relying on it couldn't have been reckless or fraudulent. Contractors say this is a common-sense decision that will shield companies from baseless lawsuits and discourage relators from filing overly broad allegations in hopes of substantiating them through later discovery.

"The decision will give comfort to a lot of government contractors," said Luke Levasseur, a counsel in Mayer Brown LLP's government contracts group.

But contractors shouldn't rest on their laurels, according to Kristen Ittig of Arnold & Porter LLP. Govplace and Government Acquisitions helped themselves by talking to their supplier, Ingram Micro Inc., about the certifications and getting government auditors from the U.S. General Services Administration to approve their reliance on Ingram's certifications, she says.

They were also likely helped by the fact that Ingram, which describes itself as the world's largest wholesale technology products distributor, had a method for separating out TAA-compliant products from others that were made in China or included China-made parts.

"What Govplace did in this instance is probably a good guide for other contractors. They didn't just blindly accept the certification of their suppliers; they did their own diligence," Ittig said.

Therefore, contractors can't afford to read the decision as allowing them to rely on subcontractors and suppliers even when red flags appear, she says. According to Ittig, TAA compliance can still be a trap for companies selling to the government, particularly through large commercial contracts like the GSA Federal Supply Schedule contracts used in the present case.

"Companies really need to be diligent about TAA compliance, because this decision is not a license to ignore information to the contrary," Ittig said.

Nevertheless, contractors are collectively breathing a sigh of relief at the appeals court's finding that “a contractor like Govplace is ordinarily entitled to rely on a supplier’s certification that the product meets TAA requirements,” said Jack Horan of McKenna Long & Aldridge LLP.

Because the FCA imposes liability only if a person knowingly makes a false claim or acts with “reckless disregard” to the falsity of its claims, the contractors’ sales to the federal government would not have violated the law even if they included some Chinese-made products, according to the opinion.

“I think the relator was attempting to push an aggressive argument here,” Horan said. “Relators could attempt to argue, as the relator here did, that the contractor has an obligation to look past the certification of the supplier and do its own analysis or review or investigation of the country of origin of the supplied product, and the court rejected that argument.”

That kind of due diligence would be difficult to implement, especially for commercial contractors that sell many different pieces of hardware and are less familiar with the additional TAA responsibilities for government contracts, Horan says.

“It would be burdensome and potentially very expensive, especially when you consider that some contractors, especially GSA contractors, have thousands of products on contract,” Horan said. “It's an additional requirement already for commercial item contractors to provide TAA-compliant products to the government. If the court had held otherwise, the contractors would not only have to comply with TAA, they'd also have to conduct their own review of all of the items they're supplying.”

Folliard initially brought his suit in 2007, and it was slowly pared down over a series of summary judgment motions in 2012 and 2013. U.S. District Judge Royce C. Lamberth determined that Folliard hadn't submitted any evidence showing the products at issue originated in China rather than TAA-approved countries like Japan, Mexico and the U.S.

Judges Brett M. Kavanaugh, Robert L. Wilkins and Laurence H. Silberman sat on the panel for the D.C. Circuit.

Folliard is represented by H. Vincent McKnight of Sanford Wittels & Heisler LLP.

Government Acquisitions is represented by John Mark Murdock of Benton Potter & Murdock PC. Govplace is represented by Jonathan Scott Aronie and Christopher M. Loveland of Sheppard Mullin Richter & Hampton LLC.

The case is USA ex rel. Brady Folliard v. Government Acquisitions Inc. et al., case number 13-7049, in the U.S. Court of Appeals for the District of Columbia Circuit.

Correction: A previous version of this story incorrectly stated the name of the court that issued the decision. The error has been corrected.