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Q&A With Reed Smith's Larry Sher

Law360, New York (April 02, 2013, 1:13 PM ET) -- Lawrence S. Sher is a partner in Reed Smith LLP's global regulatory enforcement group in Washington, D.C. He is a litigator specializing in government contract disputes, protests, claims and False Claims Act actions for diverse domestic and international clients across diverse industries. As Reed Smith's lead litigator in its D.C.-based government contracts practice, he has successfully tried several cases to judgment and has argued in numerous state and federal courts, U.S. Court of Federal Claims, the U.S. Government Accountability Office, Boards of Contract Appeals, and before federal and state agencies, administrative law judges, and national and international arbitration tribunals.

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

A: Five years ago, a major manufacturing client was threatened with scores of product liability suits filed against them in state courts that sought many millions of dollars. The cases arose out of products the company sold to the government during World War II. The client came to us after having been told by another major law firm that they could not assert the government contractor defense and should settle all the cases or consider other drastic options.

After carefully researching the history of their WWII products, engaging historical archivists, marshaling the facts concerning their products and the WWII-era contracts, retaining two former Naval officers as experts, and applying the relevant law, I was able to remove the latest-filed product liability case to federal court utilizing federal officer removal and demonstrating the strength of the clients' government contractor defense we had developed.

Deprived of their preferred state-court forum, it was not long before we were able to force the plaintiffs to settle all cases on extremely favorable terms. The company has been able to successfully deploy the defense we developed in successive, unrelated cases. The defense was particularly challenging because there were no remaining fact witnesses, the company had no relevant documents of its own, and all of the available government documents were more than 50 years old and dispersed in various repositories across the country. The only place we were able to find an actual product sample was on e-Bay.

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

A: There is no question that the government and whistleblower/relators are increasingly misusing the civil False Claims Act to address conduct by contractors that is not actually fraudulent. I remember back in the late 1980s, when virtually every complaint contained a civil Racketeer Influenced and Corrupt Organizations Act count attempting to manufacture RICO claims to address conduct that clearly was not within RICO's purview. The FCA is the RICO of this decade. But, like RICO, the FCA, with its onerous treble damages and attorneys' fee provisions, was not intended to remedy every violation of law; but only fraud and false claims against the government.

Too many contractors have been pressured into expensive FCA settlements because of the enormous potential costs of litigating or losing a FCA case without even a prima facie showing of fraud or a false claim. This can have a crippling effect on many contractors. Whistleblowers serve an important function, but the FCA should not be abused by relators, or federal or state governments, looking for new revenue streams in a down economy. Recent legislative reforms have expanded the reach and scope of potential FCA violations and increased the number of FCA suits. Legislative or judicial reform is needed to narrow the reach of the FCA to cover only cases of fraud and false claims against the government, not as a catch-all remedy to police regulatory violations or contractual breaches.

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

A: Bid protests are important to hold the government accountable for its conduct in state and federal procurements. Protests help ensure that our contractor clients are evaluated and treated fairly throughout the evaluation and source selection process. Since a high percentage of bid protests are resolved through agency corrective action, however, it's imperative that the corrective action voluntarily proposed or ordered have teeth to remedy the principle procurement problems raised in the protest. Too often, agencies cave at the last minute before their agency record is due and announce they will take corrective action that ends up being ineffective, delayed or incomplete — far from action which "completely and irrevocably eradicate" the effects of the alleged procurement violations, as required by law. Fortunately, protestors are beginning to have some success challenging ineffective agency corrective action in the U.S. Court of Federal Claims (e.g., McTECH Corporation v. U. S., 105 Fed. Cl. 726 (2012). Hopefully, we will continue to see more decisions supporting the contractors' right to obtain effective and complete agency corrective action.

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

A. Lawrence P. Block (Stinson Morrison Hecker) and I were challenging a contract award on behalf of different protestors last year and I was impressed by his advocacy in a complicated protest.

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

A: Early in my career, I was defending against a motion for summary judgment filed by the U.S. Department of Justice in the U.S. Court of Federal Claims seeking dismissal of all of my client's multimillion-dollar breach of contract claims. At oral argument, I expected that the DOJ attorney would go first, and I would be prepared to respond, since it was the government's motion. The judge called our case, stated that we were before the court on the government's motion for summary judgment, and then ordered me to argue first. The court asked me to explain the reasons why the court should not grant the DOJ's motion and answer a specific set of loaded questions the court had just prepared for me. When it was the DOJ attorney's turn, he merely parroted back the court's questions and argued that we had not sufficiently answered them. This experience certainly taught me about home-court advantage and to be prepared for anything thrown my way at all future oral arguments.

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