

## Your Competitor Bribes The Government: What Do You Do?

*Law360, New York (June 20, 2012, 1:25 PM ET)* -- There are many laws in place to prevent fraud and abuse in government contracting. Some statutes prohibit government officials from accepting bribes and gratuities.[1] That doesn't mean pay-to-play in the government contracts arena is a regular occurrence, but it happens.

What can you do when one of your competitors bribes a government official to win a government contract for which you competed? And since the briber and the bribee generally conduct their business in secret, what do you do when you find out years after the bad act?

Any contractor can find itself the victim of unfair practices by its competitors. There are avenues for relief, but some are more difficult to travel than others. A recent case highlights the challenges that government contractors face when they believe bribery or other misconduct played a role in losing a contract.

### The Admark Korea Case

On June 11, 2012, the Court of Federal Claims in *Admark Korea Ltd. v. United States*, No. 11-778C (Fed.Cl. June 11, 2012) dismissed a complaint filed by Admark Korea Limited against the improper award of a government concessions contract by the Army & Air Force Exchange Service ("AAFES"). AAFES is a nonappropriated fund activity under the U.S. Department of Defense that provides merchandise and services to military personnel and their families.[2]

Admark was the incumbent contractor with a contract to lease cellphones and sell cellphone accessories and phone cards at eight military bases in Korea.[3] Admark's contract was re-competed, and Admark and Samsung Rental Company both submitted bids.[4] Admark was notified on July 19, 1999, that Samsung was awarded the contract.[5] Admark challenged the award in August 1999. The COFC decision did not explain the basis for the original challenge or identify the original forum. In any event, the challenge was not successful.[6]

Almost eight years later, after Samsung performed for the entire contract term, Admark learned from a news article that a Samsung executive had bribed AAFES employees in return for concessions contracts. [7] In November 2011, almost four years after the news article, Admark filed a lawsuit at the U.S. Court of Federal Claims alleging that AAFES, through its employee, breach an implied in fact contract with Admark. In its lawsuit, Admark asked for expectation and restitution damages.[8]

## **The Accrual Suspension Rule**

The COFC dismissed the case on statute of limitations grounds.[9] Every cause of action at the Court of Federal Claims must be brought within six years of when the claim first accrues.[10] Plaintiffs may have a longer time to file if they can show they were unaware of the existence of the claim or the injury was inherently unknowable as of the accrual date.[11] This is referred to as the accrual suspension rule.

AAFES argued that the statute of limitations had run because Admark's cause of action accrued in 1999 around the time Samsung was awarded the contract.[12] Admark argued that the statute of limitation should not be deemed to have accrued until January 2007, when Admark read the news article about Samsung's bribes for concession contracts.[13]

The COFC ultimately decided Admark's cause of action was time-barred.[14] The COFC's reasoning highlights the tension between the knowledge about the government's bad acts that will start the clock for statute of limitation purposes versus what hard facts a contractor would need to prove to prevail on a claim against the government for misconduct.

## **Well-Nigh Irrefragable Proof**

The COFC noted that in 1999, Admark already had grown suspicious of the circumstances surrounding the award decision to Samsung.[15] That was apparent from the pleadings it filed challenging the award to Samsung.[16] And at the time, Admark admitted it also was aware of the reputation of AAFES as being corrupt.[17] But Admark did not believe it had the hard facts to prove that an AAFES employee had accepted bribes from Samsung for the follow-on contract. According to Admark, it could not have prevailed under such a cause of action with the information it had at the time.[18]

Admark probably is correct. Government officials are presumed to act in good faith, unless the contractor can show "well-nigh irrefragable proof" of bad faith.[19] The law requires more than mere speculation of misconduct and plaintiffs are required to plead hard facts to prove bad faith of government officials.[20] For that reason, it is extremely difficult for contractors to prevail in causes of action based on bad faith of government officials.

According to Admark, only after the facts about Samsung's practices were disclosed in the news, did Admark have enough information to allege a breach of contract claim against the AAFES.[21] The COFC did not agree, explaining that the news article did not have any legal effect on Admark's claims against the AAFES official because the article discussed Samsung's corrupt practices involving other AAFES concession contracts — not the concessions contract sought by Admark in 1999.[22]

More significantly, the COFC noted that Admark had admitted that in 1999 an undisclosed source had told Admark that an AAFES employee had accepted \$100,000 and a 5-percent monthly kickback from Samsung in return for the award of the follow-on contract.[23] We do not know if Admark would have prevailed had it asserted a claim in 1999 based on the information from the undisclosed source. What we do know is that, unfortunately for Admark, it knew enough at the time of the award in 1999 to trigger the accrual suspension rule, even if it did not have enough information to bring a cause of action against the government for the bad faith of the AAFES official.

It is clear from the COFC's decision that contractors should not rely on any tolling of the statute of limitations when they suspect bad acts, even if they have yet to discover the hard facts necessary to bring a claim against government official. Where that leaves contractors is hard to say.

## Lessons Learned

The outcome for Admark is harsh, especially if its allegations about the circumstances of the AAFES award to Samsung are true. At the same time, Admark's complaint came about 12 years after the contract was awarded, 12 years after Admark had some basis to believe that there might have been improprieties regarding the award, and four years after Admark admitted learning of the bribe. It is no surprise that there were timeliness issues surrounding Admark's complaint. And, while Admark apparently did file a challenge to the award around 1999, we do not know where the challenge was filed, what was argued, and whether there was a negative decision that was appealed. The Admark decision did not discuss that information.

And, the tension between requiring facts to support an allegation of bad faith and the risk of being dismissed for timeliness reasons if the allegations are not asserted presents hard choices for a contractor. Beside statute of limitation issues and ordinary bid protest timeliness rules, Federal Acquisition Regulation 33.102(f) provides that no person may file a protest at U.S. Government Accountability Office "for a procurement integrity violation unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 423(g))."

So what can or should a contractor do when it has some evidence that a competitor had bribed a government official to get a contract? The answer will depend on the specific facts involved, but you should consider:

- Promptly reporting the evidence of the misconduct. There are FAR provisions that deal with reporting suspected violations of the gratuities clause and consequences of offering gratuities. [24]
- Timely protest misconduct. Remember the GAO's 10-day and 14-day rules.[25]
- Consider pursuing claims against your competitor. There may be a basis to assert claims under state law for unfair competition and tortious interference with prospective business relations.
- Take advantage of any discovery offered by the forum you select. That could be requests for documents at the GAO in bid protests or full discovery rights in state court.

Back to the basic facts. What if you suspect nothing at the time of the award and you do nothing? Years pass. Then you read in the paper that the U.S. Department of Justice has done the heavy lifting and your competitor has been indicted or convicted of bribery. Is all lost? Negative. Provided that you act in a timely fashion when you do learn the basis for a protest or claim, and the basis for the protest was not previously known to you and you had no prior reason to know a basis for the protest, your protest or claim can still be timely asserted years after the initial award.

So keep on reading the news. It could give you a basis to assert protest rights and claims.

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[1] See, for example, 18 U.S.C. §201.

[2] EXCHANGE QUICK FACTS,

<http://www.shopmyexchange.com/AboutExchange/exchangequickfacts.htm> (last visited Jun. 13, 2012).

[3] Admark at \*1.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Id. at \*7.

[10] 28 U.S.C. § 2501 (2011).

[11] Admark at \*3 (quoting *Holmes v. United States*, 657 F.3d 1303, 1317).

[12] Id. at \*4.

[13] Id. at \*3.

[14] Id. at \*7.

[15] Id. at \*5.

[16] Id.

[17] Id.

[18] Id. at \*4.

[19] See *Tecom Inc. v. United States*, 66 Fed. Cl. 736, 767 (2006) (quoting *Knotts v. United States*, 121 F.Supp. 630, 631 (1954)).

[20] See *Chenega Management LLC v. United States*, 96 Fed. Cl. 556, 575 (2010).

[21] Admark at \*4.

[22] Id. at \*7.

[23] Id. at \*6.

[24] FAR 3.202 and 52.203-3.

[25] 4 CFR § 21.2 and 4 CFR § 21.5(d).

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