

MEDIA MENTION

Daniel Graham and Scott McCaleb Discuss Government Contracts Cases to Watch in 2013

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Daniel P. Graham and Scott M. McCaleb, partners in Wiley Rein's Government Contracts Practice, were interviewed by *Law360* for an article on cases that will be watched closely this year.

One such case is *Kellogg Brown & Root Services Inc. v. United States*, pending in the U.S. Court of Appeals for the Federal Circuit, according to the article. Wiley Rein, led by Mr. Graham, filed an *amicus curiae* brief in the case this month, on behalf of the Professional Services Council (PSC) and the National Defense Industrial Association (NDIA).

The two trade associations support Kellogg Brown & Root Services' (KBR) appeal of a U.S. Court of Federal Claims (COFC) ruling that rejected as unreasonable approximately \$29 million of costs that KBR incurred to provide food services to the U.S. Army during the Iraq war under a cost-reimbursement contract.

The *Law360* article cited the *amicus* brief's warning that the COFC ruling, if upheld, could set a harmful precedent for government contractors whose prices rise because of circumstances beyond their control. The brief also argued that the COFC's method for determining whether costs incurred by KBR were reasonable was inconsistent with the Federal Acquisition Regulation's (FAR) treatment of such costs.

"This will be the case that everybody will cite on this issue for years to come," Mr. Graham told *Law360*.

Related Professionals

Scott M. McCaleb
Partner
202.719.3193
smccaleb@wiley.law

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Mr. Graham said the FAR rule on cost-reimbursement reasonableness is typically understood to be a deferential standard, because those types of contracts require the government to shoulder financial risks for costs that can't be easily estimated at the beginning of a project. The federal appeals court could undermine the deference given to contractors if it upholds the COFC ruling enabling the government to disallow costs based on an auditor's later judgment of what the auditor would have done in the same circumstances, he said.

There is very little case law interpreting the FAR standard, and the KBR case is the first time the Federal Circuit has taken up the issue, Mr. Graham said. In the brief filed by Wiley Rein, PSC and NDIA argued that under cost-type contracts, contractors may recover their costs even if they make a mistake, provided the mistake was reasonable.

"However the court articulates that rule as it applies here will impact virtually every cost-reimbursement contract," Mr. Graham told *Law360*. "It was a very complicated and difficult contracting environment, and some of the decisions, in hindsight, may not have been the best or most cost-effective decisions. But the focus can't be on hindsight."

Another Federal Circuit case that could have broad implications for federal contractors is *U.S. v. Raytheon*, according to the article. The U.S. is appealing a \$59.2 million judgment that Raytheon won against the government last year after a seven-year battle to recover unpaid pension deficits.

"The Raytheon case is important to industry because it deals with underfunded—as opposed to overfunded—pension plans, and thus addresses the government's need to shoulder its fair share of an underfunded plan once a government contractor's business segment closes," Mr. McCaleb told *Law360*.