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False Claims Act

How Trump's 'Buy American' Order May Shape Fraud Cases

BY DANIEL SEIDEN

A Washington jury will decide this fall if Capitol Supply Inc.'s sale of paper shredders made in China — rather than the U.S. — defrauded the General Services Administration.

A district court opinion said GSA personnel gave Capitol Supply ''mixed signals'' as to how critical compliance with the Trade Agreements Act and Buy American Act was. The inconsistency forced the court to rule that it was inconclusive whether Capitol Supply violated the False Claims Act.

Capitol Supply could beat the case if it convinces the jury that the government was always going to pay for its products — American or not. That would show that compliance wasn't material to government payment decisions, which is necessary for a valid false claim under Supreme Court standards.

Some government contracts attorneys are doubtful that President Donald Trump's Buy American policy directives, such as the Buy American and Hire American executive order issued April 18, could clear up the court's confusion and make a difference in this case.

However, the executive order and a June 30 memorandum from the Office of Management and Budget and the Commerce Department could lead to stricter enforcement of Buy American compliance by agency personnel, some attorneys said.

That, in turn, could show judges in future cases that these Buy American requirements are material, and that noncompliant contractors are committing fraud when they bill the government.

'Hot-Button' Assuming federal agencies comply with the June 30 memo's reporting obligations, ''I think the impact of those efforts will provide evidence of materiality, and will prompt agencies themselves to define their regulations in this area as material,'' said Susan Schneider Thomas, shareholder with Berger & Montague PC, Philadelphia, which represents whistleblowers in false claims actions.

Agencies' procurements must maximize the use of material produced in the U.S. and report details of internal reviews that evaluate compliance with the Buy American Act and Trade Agreements Act, the memo said.

''I think you will see a lot of enforcement in this area,'' Dismas Locaria, a partner in the government contracts group at Venable LLP, Washington, told Bloomberg BNA.

''Contracting officers are required to oversee compliance with the domestic preference provisions in contracts, and the fact that 'Buy American' has become a hot-button, politicized issue will make them reluctant to pay noncompliant contractors,'' he said.

''Additional policy statements by the President and OMB reinforce an already-clear policy position and make it more likely that all government employees will get the message that these issues are important, hence material,'' Brian D. Miller, a shareholder in the government contracts practice group at Rogers Joseph O'Donnell PC, Washington, told Bloomberg BNA.

However, in the government, ''you always have the problem of some employees not getting the message and doing something that sends a mixed message — whether it's unwittingly or not,'' said Miller, a former federal prosecutor and inspector general with the GSA. ''When that contrary message is sent, it is still a mixed message — and judges are uncomfortable granting summary judgment when there are mixed messages.''

Jury to Address 'Mixed Signals' The Buy American Act provides that federal agencies may only purchase articles produced in the U.S.

The Trade Agreements Act provides exceptions to the Buy American Act by allowing the president to identify designated countries that can provide goods sold to agencies.

Capitol Supply said it couldn't be liable under the FCA because the government kept paying it and renewing contracts even though clear markings showed the GSA that the products originated in China.

This meant Buy American requirements weren't material under Supreme Court false claims standards in *Universal Health Servs. Inc. v. United States ex rel. Escobar*, Capitol Supply said.

The government, on the other hand, said it clearly objected to Buy American noncompliance by repeatedly sending contract breach warnings, as well as a letter that imposed sanctions on Capitol Supply.

Ultimately, the ''mixed message'' muddied the waters enough for the court to punt the matter to a jury.

''Whether these mixed signals are due to ignorance, incompetence, political pressure, or worse, on the part of GSA employees, ineffective communications within GSA, or discounting of concerns over the defendant's [Trade Agreements Act] non-compliance, are determinations that will rest on credibility assessments and are consequently appropriately left to the jury,'' said Chief Judge Beryl A. Howell of the U.S. District Court for the District of Columbia.

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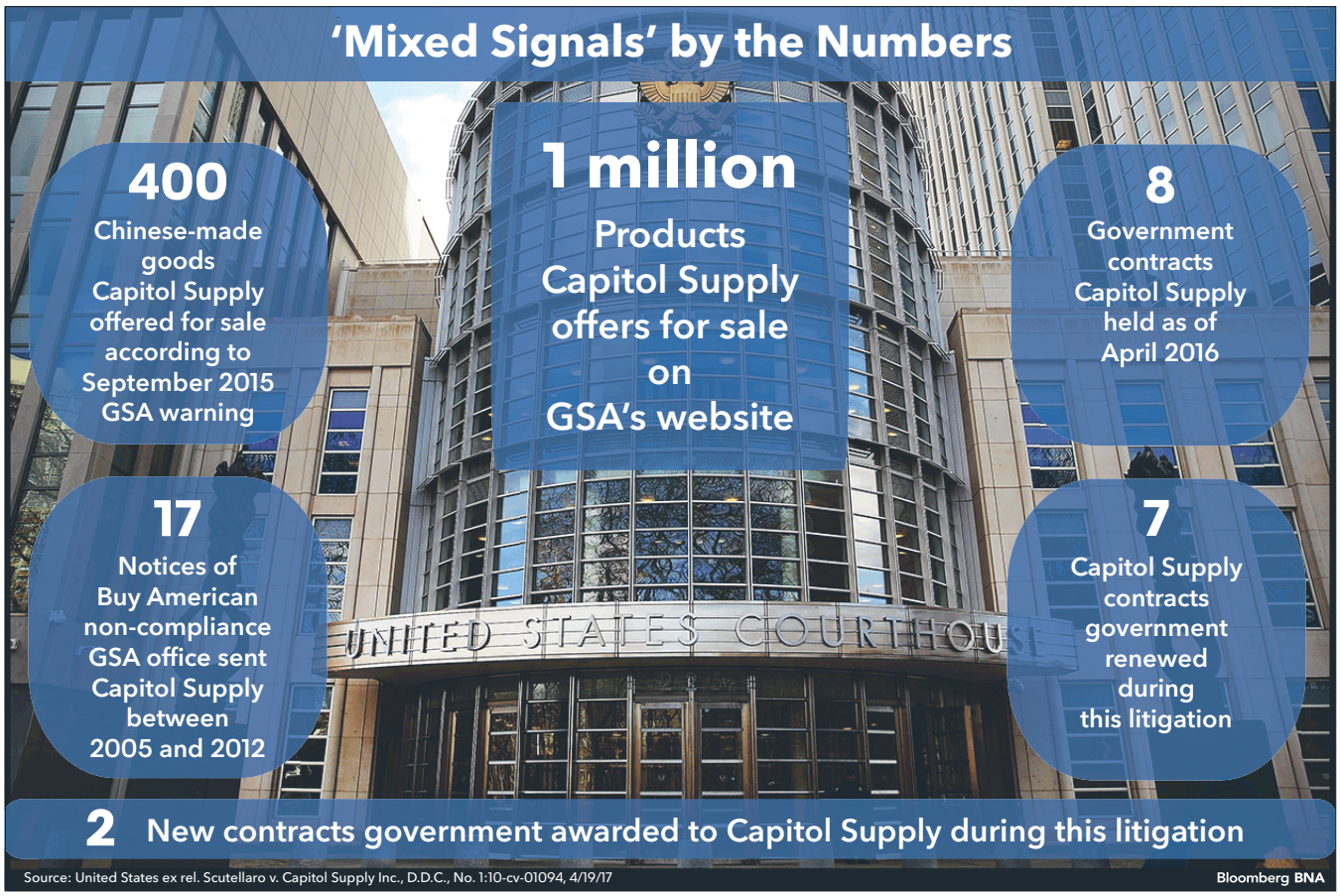
The trial is set to begin Sept. 18.



Increased Pressure Trump's executive order by itself wouldn't have made a difference in this case, but the June 30 memo could have a bearing on Buy American materiality in the future ''if it results in clear policies that are communicated to contractors and adhered to consistently by the government,'' Christopher Loveland, a partner in the government contracts practice group at Sheppard Mullin Richter & Hampton LLP, Washington, told Bloomberg BNA.

''There has been increasing pressure on the GSA to ensure Buy American Act and Trade Agreements Act compliance over the past year, starting with a January 2016 letter to the GSA from Senator [Chuck] Schumer,'' Loveland said, referring to the Democrat from New York. ''This memorandum only serves to increase that pressure.''

The June 30 memo directs agencies to:

- assess their compliance with Buy American laws including use of exceptions and waivers;
- develop policies to maximize use of U.S.-produced material;
- limit use of Buy American Act exceptions and waivers;
- report findings to the OMB director and commerce secretary by Sept. 15, 2017.

''Actual steps in those directions, and the requirement to report specifically on the stepped-up enforcement, will likely support materiality determinations in the future,'' Thomas told Bloomberg BNA.

Where Rubber Meets Road The executive order could have affected the case against Capitol Supply had it been in place at the time of the sales by leading the GSA ''to take more affirmative action'' against Buy American noncompliance, said John L. Warren III, an attorney at Simmons Law Firm LLC in Columbia, S.C., which represents whistle-blowers.

However, the GSA in this case failed to accurately assess Capitol Supply's noncompliance with existing law, and both defense and whistle-blowers' attorneys working on such cases must focus on the work product of government employees who evaluate compliance, he added.

''The quality of agency oversight and enforcement may, in some cases, be directly correlated with the success or failure of an implied certification case,'' Warren said.

Policy directives are important, but the conduct of contracting officers and agency reactions to wayward contract performance can make or break a materiality assessment in a false claim case.

''Materiality is determined by the people on the ground like contracting officers and other agency personnel,'' Locaria said. ''If they have knowledge of noncompliance and still make payments to contractors, that's a strong indication, especially under *Escobar*, that the term might not be material.

''Compliance, while discouraged, is waivable,'' he said.

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