Published on *The National Law Review* https://natlawreview.com

Recent Supreme Court Activity with Major Implications for Government Contractors

Article By:

Matthew P. Delfino

Luke Cass

Joshua A. Mullen

Two recent Supreme Court matters signal major implications for government contractors. First, the Supreme Court will review whether government contractors can appeal a denial of a sovereign immunity defense in lawsuits arising from their work before the lawsuit concludes. Second, a recent Supreme Court decision provides regulators with another enforcement tool over government contractors. We address each issue in turn below and provide our takeaways for what it means for your company.

Sovereign Immunity Defense Under Review

Earlier this month, the U.S. Supreme Court granted a petition from The GEO Group, Inc. to hear a government contractor's claim involving derivative sovereign immunity. The plaintiffs in the underlying case were detainees at a facility operated by GEO under its contract with U.S. Immigration and Customs Enforcement. They allege that GEO violated the federal Trafficking Victims Protection Act and was unjustly enriched under Colorado law by the forced labor of its detainees.

In its motion for summary judgment, GEO responded that it was entitled to derivative sovereign immunity under *Yearsley v. W.A. Ross Constr. Co.*. The district court rejected GEO's argument, finding that ICE did not require or direct GEO's allegedly violative conduct. . The Tenth Circuit Court of Appeals dismissed GEO's appeal on jurisdictional grounds, holding that it could not review the immunity defense "completely separate" from the merits of the case.

The sovereign immunity defense that GEO raised, also known as the *Yearsley* doctrine, grants a government contractor immunity from liability when the government validly authorizes the contractor's actions, and the contractor executes those actions as directed. The *Yearsley* doctrine allows contractors to mitigate risks in their contracts and prevents political interest groups from undermining the policies they disagree with by targeting the contractors that the government hires.

The Supreme Court will hear the case during its October 2025 term and will likely release their decision in the spring or early summer of 2026. Government contractors should closely watch the results of this case, which could have significant impacts on its ability to raise the *Yearsley* doctrine defense.

Increased Risk for Government Contractors in Fraud Cases

A recent Supreme Court decision, *Kousisis v. United States*, exposes government contractors to increased potential criminal liability for the representations they make to win business with the government. In that case, the Supreme Court upheld the conviction of a government contractor for violations of the federal wire fraud statute based on representations the contractor made in its contract with a state agency, even though the agency could not show that the contractor intended to cause the agency any economic damages.

In *Kousisis*, the Pennsylvania Department of Transportation solicited two contracts for bridge painting projects. PennDOT's contracts required that a Disadvantaged Business Enterprise ("DBE") perform a commercially useful function on the projects. At trial, the government showed that Kousisis, a project manager at Alpha Painting and Construction Company, falsely represented that Alpha would comply with this requirement. During the projects, the certified DBE used by Alpha was actually just a "pass-through" entity, which did not meet the contract requirement.

Although PennDOT did not take any issue with Alpha's work, the government still charged Kousisis and Alpha of wire fraud and conspiracy to commit wire fraud. The Court concluded that the federal wire fraud statute encompasses fraudulent inducement, which exists when a false representation causes someone, including a governmental entity, to agree to a transaction. Wire fraud "is agnostic about economic loss. The statute does not so much as mention loss, let alone require it. Instead, a defendant violates § 1343 by scheming to 'obtain' the victim's 'money or property,' regardless of whether he seeks to leave the victim economically worse off," according to the Supreme Court.

Key Takeaways

Companies should consider the following issues as they navigate these recent shifts:

- A ruling for GEO could be significant for contractors who often find themselves litigating state and federal claims arising from the performance of their contracts with the government. The *Yearsley* doctrine defense can provide immunity from liability when the government validly authorizes the contractor's actions, and the contractor executes those actions as directed.
- The *Yearsley* doctrine defense can substantially improve a contractor's position in litigation, but comprehensive compliance policies and contract execution that precisely aligns with government direction will be a key component to successfully raising it.
- *Kousisis* has significant implications for government contractors who, while trying to secure contracts, are often confronted with numerous requirements and may make various representations about their work. Even when the government is satisfied with a contractor's work and suffers no economic harm, the contractor may still be exposed to criminal liability. Reducing or eliminating this exposure will require comprehensive business ethics and conduct policies that stress the importance of accurate representations and certifications to government customers, and guidance from experienced government contracts counsel throughout all stages of the procurement process.
- Effective and robust compliance programs help mitigate risks. Compliance frameworks help promote fairness across a company's operations. Duties of loyalty and oversight

responsibilities for boards of directors require implementing a range of internal compliance controls, including effective reporting channels, to assess company risks. Further, comprehensive compliance measures facilitate the management of third-party engagement risks through diligent vetting, ongoing monitoring, and stringent payment controls.
- Compliance is not only good business, but also insurance in the event of enforcement. The DOJ has consistently given credit to companies with robust compliance programs when considering enforcement resolutions, monetary penalties, and post-resolution compliance obligations. Companies with strong compliance programs are better positioned to negotiate favorable outcomes in the event enforcement actions arise, making proactive investment in compliance crucial.

National Law Review, Volume XV, Number 171